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No. 595

In the Supreme Court Of the United States

OCTOBER TERM, 1959

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

NATHANIEL H. BRACY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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IN THE
SUPREME COURT
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GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

NATHANIEL H. BRACY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The Great Northern Railway Company, Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Montana, entered in the above entitled case on September 23, 1959.

CITATION TO OPINION BELOW

The Opinion of the Supreme Court of the State of Montana, dated August 19, 1959, as amended by Order of September 23, 1959, has not yet been officially reported. The Opinion of the Supreme Court of Montana is printed in Appendix "B" hereto, infra, p 21; and is reported in 343 P. 2d 848.

JURISDICTION

The Judgment of the Supreme Court of the State of Montana was entered on August 19, 1959. Petition for rehearing was filed within time allowed by the Court (R 631,634). The Petition for Rehearing was

denied by Order dated September 23, 1959, after making amendments to the original Opinion (R 684), at which time the Remittitur was issued (R 685), thereby constituting final judgment by the highest Court of the State of Montana. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, (3), since the action is one under the Federal Employers' Liability Act, (also referred to as FELA) (45 U.S.C. 51-60).

QUESTIONS PRESENTED

This case, instituted pursuant to the FELA, involves the rights of the parties under that Federal Act. Where the trial court gave an instruction which implied that defendant's employees violated Company rules, but the record does not contain any evidence showing violation of rules, is the defendant deprived of its rights under the Federal Act? Does the admission of evidence and the giving of an instruction on mortality and annuity tables impair the defendant's rights under the Federal Act where the record does not contain evidence showing permanent disability resulting from the alleged injury?

Where the only evidence of negligence of the defendant or its employees consists of the testimony of the plaintiff and such testimony is inconsistent with, and unsupported or contradicted by other testimony or facts, does the record support the submission of the case to the jury or a jury verdict in favor of plaintiff on the basis of defendant's negligence? Where the record does not contain evidence to support findings

that the injuries, if any, sustained by the plaintiff in the accident resulted in permanent partial disability, resulted in any loss of present earnings, or will result in any loss of future earnings, can a substantial verdict be properly sustained?

These questions, while involving factual determination, are not mere questions of fact or the weighing of conflicting evidence but are questions of law. Where there is a total lack of evidence to support the Court action or the judgment herein, the questions are determinative of the rights of the parties under a Federal law and are properly reviewable by this Court on certiorari.

STATUTES INVOLVED

The statutory provisions involved in Section 1 of the Employers' Liability Act, 45 U.S.C. 51 printed in Appendix "A", infra, p. 20.

STATEMENT

On July 25, 1953, plaintiff, an employee of the defendant, was involved in an accident in defendant's yards at Hillyard, Washington. The defendant is a rail carrier and plaintiff was engaged in interstate commerce at the time of the accident. Complaint was filed in the District Court of the State of Montana, in accordance with the provisions of the FELA seeking damages for the alleged injuries. At the time of the accident, about 9:00 or 9:30 P.M., plaintiff, a fireman, was operating a switch engine. The switch crew with which plaintiff was working, was then in the

process of making up a train and was shoving or pushing seven boxcars and three cabooses toward other cars for the purpose of coupling to a train. This was a move which was made frequently. The cars had been moved about 2,000 or 2,500 feet at a speed of about eight to ten miles per hour. (R. 301, 302, 317).

Thompson, the switch foreman, was on the front or lead car to give signals and make the coupling. Harrington, a switchman, was about in the middle of the string of cars setting brakes and Rowley, a switchman, was on the caboose immediately ahead of the engine to give signals to the engineer. Plaintiff testified that he was able to see Rowley's lantern at all times and no signals were given until he noticed the "washout" or emergency signal given simultaneously by Rowley and by Thompson who had gotten off the lead car. Before the plaintiff was able to act on this signal the string of cars he was pushing collided with the standing cars to which they were to be coupled (R. 58). He testified that he swung around, hit his head on a brace and that is all he remembers. Plaintiff stated that when he came to he was on the floor and the engineer helped him up but that things were not clear until the next day. He states that he did not finish the shift but didn't know whether the shift finished then or not. He would not deny that three days after the accident he stated he finished the shift. (R. 59, 179, 182).

Plaintiff's version is directly contrary to the testimony of the three switchmen and the engineer. Thompson's testimony is that when the front of the string of cars was about 6 or 7 car lengths from coupling that

he gave several "slow" signals and when there was no response from these he gave "stop" signals and finally emergency signals from the ground. He saw Rowley, the switchman, relaying his signals (R. 303-306). Harrington, a switchman, was about in the middle of the string of cars, setting handbrakes. He saw Thompson's signals and saw Rowley relaying them so there was no need for him to relay signal. He braced himself, when it became apparent that the engineer was not responding to the signals (R. 343, 344). Rowley's duty was to relay the signals of Thompson. He observed the signals and immediately relayed them and continued doing so. He braced himself by holding on to the rail on top of the caboose on which he was standing when no response to such signals was evident from the engine (R. 443, 444).

The engineer, in the cab of the engine, testified that plaintiff was not unconscious and was never knocked to the floor. The entire crew, including plaintiff, worked about an hour and a half after the collision. There was a small cut over plaintiff's left eye and a little blood like a scratch. (R. 466, 468-473, 309, 310, 447, 451). Exhibit "R" (R. 471) shows that no other fireman was called to take plaintiff's place.

Counsel for plaintiff inquired as to whether it was not a rule of the Company that before moving cars or engines in the yard or in the yard track that it must be known they can be moved with safety (R. 324). Inquiry was made also if it were not a rule that all trainmen place themselves so they could observe and relay signals. (R. 312), and whether it isn't a rule that dis-

appearance of a trainman's light must be regarded as a stop signal (R. 326). There is no evidence anywhere in the record to show violation of any of these rules. Notwithstanding the absence of evidence showing or inferring violation of the rules, the trial court gave an instruction (R 562) to the effect that plaintiff had a right to assume his fellow employees would obey the rules and perform their duty.

Notwithstanding plaintiff's testimony that immediately following the accident he had the severe bleeding from the cut over his left eye and the nose bleed and swelling under the right eye, he did not seek any medical aid until Monday following the accident which occurred on Saturday night. (R. 59, 60). But on cross-examination he admitted he didn't know of the swelling under the right eye and he didn't have the severe bleeding from the nose and did not tell Dr. Coulter about the swelling or nose bleed. (R. 269, 270). He returned to work three days after the accident and worked a few shifts. Five days after the accident he took a local run which required him to be away from home and was on that job until August 11, 1953. He stated that his only reason for laying off about August 11, 1953, was because of his condition but on cross-examination he admitted he was given a suspension of 15 days for his part in the accident (R 61, 62, 65, 184-187). He has worked fairly steadily since January 1, 1954. Exhibit "C", (R 268) shows plaintiff's income from July 1, 1953 to September 15, 1956, shortly before the trial. He has continued to work and the exhibit attached to the Reply to the Objections for Re-

hearing shows his gross earnings for 1957 and 1958 to be $7,831.69 and $8,457.93, respectively. (R 683) He admits that he had the scar over his left eye and also on the right side of his face as a result of an accident with a saw when he was in his teens, about 1914 (R 151). He also admits signing the physical reports in which he had stated he had had a skull fracture and that for ten months in 1947 he had headaches and dizziness although he had previously denied these facts (R. 152, 154, 156, 158, 164, 165).

Plaintiff was examined by Dr. Shields in January 1956. He did not advise Dr. Shields of any injury to his right eye because he didn't know about it then. He did not tell Drs. Shields, Thomez or Dunlap of having received any injury prior to July 1953 (R. 168, 169).

The testimony of the plaintiff's doctors was all based on the statements and medical history given to them by plaintiff and examination two and one-half years or more after the accident. The history given them by plaintiff included bleeding and the swelling under the right eye and bleeding of the nose and the absence of any injury prior to July 1953. All the doctors agreed that within 72 hours of the accident there would have been hemorrhage and observable conditions (R 102, 120, 128, 129, 134, 141).

The testimony of the plaintiff and documentary evidence contradicts the medical history given to the doctors by plaintiff. The diagnosis of the plaintiff's doctors is based on certain facts now shown not to have existed. In addition, Dr. Coulter saw the plaintiff less than 48 hours after the accident and had x-rays taken

at that time. Plaintiff had a superficial laceration over the left eye and a bruise on the left hip. The wound was dressed. Plaintiff never complained of or showed evidence of being struck under the right eye and never gave a history of any nose bleed (R. 352, 355, 357). X-rays taken at that time do not show any recent fractures or hemorrhages. The arthritis shows in the 1953 pictures. The scar over the left eye had existed prior to the accident (R. 358, 364, 365, 367). Drs. Coulter, Casebeer and Clemmons did not find any conditions of disability as a result of the accident.

The trial court submitted the case to the jury after denying the Motion for Directed Verdict (R 537). A jury verdict for $27,500.00 was returned in favor of the plaintiff (R 32). Thereafter the trial court denied a motion for new trial (R 607). Defendant then appealed to the Supreme Court of Montana (R 612). The court affirmed the judgment by a three to two decision (R 615). Petition for Rehearing was filed and was denied by order dated September 23, 1959 (R 684) and Remittitur was issued which constitutes final action of the highest court of the State of Montana (R 685).

In affirming the judgment of the trial court the Supreme Court sustained the giving of the instruction relating to rules on the basis that the evidence was sufficient to predicate a finding that the rules existed and justified the giving of Instruction No. 27. (R 620) The court does not consider the total absence of evidence to support violation of the rules. In fact the record establishes that there was no violation. The

court recognizes that an instruction on mortality and annuity tables should not be given in the absence of testimony showing permanent disability (R 623, 624). In finding that the instruction on mortality tables was properly given, in finding that the Motion for directed verdict was properly denied (R 627) and that the Motion for new trial was properly denied (R 627) the Supreme Court based its action on the presence of medical testimony which would show permanent disability. The record does not show that there is any disability by reason of this accident.

The testimony of the plaintiff and of the doctors is fully reviewed and quoted in the Petition for Rehearing commencing on page 632 of the Record. *The basis of the diagnosis by plaintiff's doctors is the medical history by plaintiff. Plaintiff's testimony conflicts with and refutes the medical history previously given to his doctors. The medical testimony which is made the basis of the opinion of the Supreme Court of Montana is not therefore based on the conditions and facts now testified to by the plaintiff.*

REASONS FOR GRANTING THE WRIT

1. The Federal Employers' Liability Act (45 U.S.C. 51-59) is a federal law and interpretation of that Act, whether by state or federal courts, is a federal question. The question of sufficiency of evidence and other substantive questions are therefore to be determined by the federal decisions. *Jesionowski v. Boston & Main Railroad*, 329 U.S. 452, 91 L. Ed. 416, 67 S. Ct. 401; *Brady v. Southern Ry Co.* 320 U.S. 476, 88 L. Ed. 239, 64 S. Ct. 232.

Before recovery may be had by an employee under the FELA, there has to be proof that the employee was injured and that the employer's negligence played a part, however slight, in producing the injury for which damages are sought. 45 U.S.C. 51, Appendix A. The recent decisions of this Court have placed a most liberal construction on the federal act. It has been held that the question is whether, with reason, the conclusion can be drawn that the negligence of the employer played any part at all in the injury or death. It has also been held that in FELA cases the inquiry today rearely presents more than the single question whether negligence of the employer plays any part, however small, in the injury or death. The burden of the employee is met and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make the inference. *Rogers v. Missouri P.R. Co.* 352 U.S. 500, 1 L. Ed (2) 493, 77 S. Ct. 443; *Sinkler v. Missouri P.R. Co.* 356 U.S. 326, 2 L. Ed. (2) 799, 78 S. Ct. 758. The holding of the Court does not, however, change the statutory requirement that before there can be recovery under the FELA there has to be some negligence on the part of the employer which is the proximate cause of the injuries claimed. The rule in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 that the weight of the evidence under the FELA must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury, has not been rejected or reversed.

The recent decisions have brought forth dissenting

opinions. Mr. Justice Harlan, dissenting in *Rogers v. Missouri R.R. Co.*, 352 U. S. 500, 563, pointed out that verdicts must be based on evidence—not on a scintilla of evidence, but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. It was further stated that it has been the function of the court to see that jury verdicts stay within that boundary; that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifts that duty from the Court. Mr. Justice Harlan in his dissenting opinion in *Sinkler v. Missouri P.R. Co.* 356 U. S. 326, 333, again pointed out his belief that the majority of the Court has been rapidly converting the FELA into what amounts to a Workmen's Compensation statute. The most recent pronouncements on this matter are found in the dissents of Mr. Justice Harlan and Mr. Justice Whittaker in *Harris v. Pennsylvania Railroad Co.* U.S. ....., (decided Oct. 19, 1959), where we find this statement:

> "I cannot understand how on this record even the 'scintilla' rule of Rogers and its progeny, see dissenting opinion in Sinkler v. Missoura Pacific R. Co. 356 U.S. 326, 332, can be thought to justify the overturning of this Judgment. I fear that this decision confirms my growing suspicion that the real but unarticulated meaning of Rogers is that in FELA cases anything that a jury says goes, with the consequence that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. See separate memorandum in Gibson v. Thompson, 355 U.S. 18, 19. If so, I think the time has come when the Court

should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases. Continuance of the present unsatisfactory state of affairs can only lead to much waste motion on the part of the lower courts and defense lawyers."

Even with the liberality of the decisions, we still understand the law to be that there must be evidence, either actual or circumstantial, to show negligence, no matter how slight, of the employer. It is equally important that the injury for which damages are sought must be caused by that negligence. It is essential, if the defendant's rights are to be preserved and the Congressional action is to have any meaning that the court require the jury verdict be based on adequate and proper evidence. Findings that the injury for which damages are sought was caused by the act of negligence alleged is fully as important a fact condition to be found by the jury as the question of negligence. If the verdict in this case is sustained on this record then the question of whether the condition existing was caused by the alleged negligence is removed from the requirements of recovery under the act.

Conclusions of the Supreme Court of Montana cannot be used as the basis of depriving defendant of its rights under the Congressional Act when the record does not support the conclusion. It is recognized that this Court is a court of law and not one for the mere correction of errors of fact. The numerous cases recently presented and passed on which involve the FELA show, however, that this Court has reviewed the

facts in this class of cases in order to pass on the law issue. (See summary of cases listed in the concurring opinion of Mr. Justice Douglas in *Harris v. Pennsylvania Railroad Co.*, U.S. , (decided October 19, 1959). If the facts are so intermingled or if the evidence does not support the verdict or opinions of the Court below, then the question of sufficiency is one of law and should be passed on by this Court. *Sterling v. Constantin*, 287 U.S. 378, 398, 77 L. Ed. 375, 53 S.Ct. 190; *Craig v. Harney*, 331 U.S. 367, 373, 91 L. Ed. 1546, 67 S.Ct. 1249.

Mere assertion in the opinion of the Court of what the evidence will support or quotations of evidence from the record, do not establish facts. *Where the record positively denies facts which are the very basis of medical diagnosis, the medical diagnosis fails.* In such a case we have an exceptional fact circumstance which requires corrective action by this Court, if complete miscarriage of justice is to be prevented. The evidence as to injury and whether the injuries alleged resulted from the alleged negligence is not conflicting. *Plaintiff's own testimony removes the foundation of the medical testimony. The record does not furnish the factual foundation which directly or by inference can justify the verdict or the Court action in upholding the verdict.* Here there is obvious and exceptional showing of error which warrants this Court reviewing the facts in order to determine as a matter of law whether the evidence is sufficient. *Graver Tank & Manufacturing Co. v. Linde Air*, 336 U.S. 271, 275, 93 L. Ed. 672, 69

S.Ct. 535; Frey Roofing Co. v. Wood, 344 U.S. 157, 160, 97 L. Ed. 168, 73 S.Ct. 204.

Defendants can look only to this Court to protect their rights. In view of the recent decisions of this Court, the bar and lower courts are left at the mercy of juries, irrespective of the evidence, unless this Court pronounces rules equally as clear as those pronounced in Rogers, and other cases, setting forth that the plaintiff's recovery must be based on adequate evidence and that the injury must be shown by evidence to be caused by the negligence alleged.

In affirming the jury verdict where the record does not support the giving of two instructions which were prejudicial to the defendant and in affirming the jury verdict where the evidence wholly fails to establish that the injuries claimed, and for which damages were purportedly allowed, resulted from the alleged acts of negligence, the Montana Court decided questions of substance in a way not in accord with the applicable decisions of this Court. The correct interpretation of the FELA is of vital concern not only to railroad employees but to the railroad industry as such and it is of paramount importance that erroneous interpretation be corrected by this Court.

2. The trial court gave Instruction 27, over objection, which states that plaintiff had a right to assume his fellow employees would obey the rules of the Company and perform their duties thereunder (R. 539, 540, 562). The Montana Supreme Court found that the testimony substantiated the existence of certain rules and justified giving the instruction (R. 620).

There is a total lack of any evidence showing violation of any rule by the defendant employees. The giving of this instruction cannot help but imply to the jury that there was evidence relating to violation of rules, a fact not contained in the record either directly or by inference. The view of the Montana Supreme Court that proof of the existence of the rule justifies the instruction would make the giving of the instruction proper on proof that any rule existed, whether it was applicable to the facts or whether it was violated. Rules should not be admitted unless such rules are applicable under the circumstances. *Louisville & N.R.R. Co. v. Riverman's, Adm'x*, 15 S.W. (2) 300; *Thompson v. Downey*, 78 F 2d 487, 490; *Murray v. New York, N.H. & H.R. Co.* 255 F 2d 42. If inapplicable rules should not be received in evidence, instructions referring to rules where there is a total lack of evidence to show violation of any rule, should not be given.

3. The trial court received evidence and gave Instruction 28 relating to mortality and annuity tables (R. 279, 542, 562). The Court likewise denied a motion for directed verdict and a motion for new trial. The action of the Montana Supreme Court in sustaining the lower court is based on the contention that the medical evidence shows there is permanent disability and that the evidence of injury is sufficient to support the court action.

The testimony of Dr. Shields relied on in the opinion of the Montana Court is based on medical history given by plaintiff and his examination two and one-half years after the accident. The doctor's diagnosis is based

on the history of severe bleeding of the nose and swelling under the eye. immediately after the accident. He was not told of this swelling under the right eye or the nose bleed when plaintiff first came to him and did not find the fracture under the right eye. It was not until July 1956 that the doctor was told of this symptom (R. 97). These are the facts given to Dr. Shields on which he bases his conclusions quoted and relied on in the Montana Court opinion.

This medical history given to Dr. Shields and plaintiff's other doctors conflicts with other testimony. Dr. Coulter examined him less than 48 hours after the accident and had x-rays taken. Plaintiff never gave any history of nose bleed. There was a small cut within an old scar over the left eye. Plaintiff had had the scar over his left eye since about 1914 when he had an accident in using a saw. There was no visual or x-ray evidence of recent fractures. His fellow employees testified that he remained with the crew for an hour and one-half and that he had only a slight cut over the left eye.

Moreover, we have a direct denial of the medical history which plaintiff gave his examining doctors by the plaintiff himself. The plaintiff admitted that he had had this accident with a saw in 1914 and as a result had the scar over the left eye and a scar on the right side of his face (R. 151). He admitted having signed the physical examination reports where he said he had a skull fracture and also headaches (R. 152, 153, 156, 158, 164). He stated that he did not tell Dr. Coulter about the swelling under the right eye because "I didn't

know" and didn't tell him about the severe nose bleed. He didn't have them up to the time he saw Dr. Coulter on Monday morning (R. 269, 270). *This is not a conflict of testimony, but is a positive statement by plaintiff and completely eliminates the basis and therefore the diagnosis made by the plaintiff's doctors.* The evidence is insufficient to sustain the jury finding that the injuries exist and are therefore insufficient to support the giving of the instruction or the action of the courts in sustaining the Judgment. *Brady v. Southern R. Co.*, 320 U. S. 476. *Rogers v. Missouri P.R. Co.*, 352 U. S. 500, and other cases, even though apparently stating a more liberal rule than the Brady case, still require proof. *Where the plaintiff's personal testimony disproves his case the jury verdict should be reversed.*

Admittedly, where there is a conflict of evidence the conflict should be decided by the trier of the fact. Plaintiff states no signal was even given until the stop signal was given too late to be effective. Three of defendant's employees stated that the signals were properly and timely given and were not acted upon by the plaintiff. This generally would be a conflict of evidence to be left to the jury. However, the testimony of the plaintiff changing the medical history from that given his examining doctors, his stating that his reason for laying off was only because of his not feeling well and later admitting he was suspended, and other inconsistencies in plaintiff's own testimony, cast great doubt on his testimony. The testimony of the defendant's employees is supported by the general probability of such testimony, and by the record, made at the time,

showing that plaintiff finished his shift (R. 471). Under these conditions a jury was not entitled to disregard the testimony of defendant's employees. *Chesapeake & Ohio R. Co. v. Martin*, 283 U.S. 209, 75 L. Ed. 983, 51 S. Ct. 453; *Sullivan v. Northern Pacific R. Co.* 109 Mont. 93, 94 P 2d 651. The record does not support the jury verdict in favor of the plaintiff where the plaintiff's testimony shows the medical diagnosis is based on medical history given by him which he now testifies was not the fact.

Generally, the question of the amount of the damages is for the jury to fix. However, on this record there is no evidence of any loss of earnings. The record shows that he was employed steadily from January 1, 1954 up to the time of the trial. The record shows his earnings during this period (R. 265, 266). His earnings have been increasing. Dr. Shields' testimony, based on a condition shown not to be correct, cannot justify speculation as to future loss. If negligence is shown, the maximum injury shown is a cut over the left eye and whatever pain and suffering was incident thereto. No citation of authority is needed to establish that $27,500.00 damages is excessive under such facts when there is no evidence of present loss of income or any permanent injury. The opinion of the Montana Court that the verdict is not excessive is based in part on the medical testimony showing 20-25 per cent disability (R. 627). If that basis is erroneous then the reason of the Court opinion fails. Based on the record the Judgment should not be affirmed under a reasonable interpretation of the FELA.

CONCLUSION

This petition brings before this Court questions involving the FELA and the propriety of affirming a Judgment for the plaintiff where the record shows that the plaintiff did not suffer any permanent injury or loss of present earnings and will not suffer any future loss of earnings as a result of the negligence alleged, and where the action of the Court in affirming said judgment is based on assumed facts, which are shown by the record not to be correct. The question is of importance in the administration of the FELA and so substantial in its effect as to justify briefs on the merits and oral argument, for its proper determination.

Respectfully submitted,

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APPENDIX A
UNITED STATES STATUTES

45 U.S.C. § 51: *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign comerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B

No. 9826

STATE OF MONTANA, IN THE SUPREME COURT

JUNE TERM, 1959

NATHANIEL H. BRACY,

Plaintiff and Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Defendant and Appellant.

Submitted: April 15, 1959
Decided: August 19, 1959
Filed: August 19, 1959. Thomas J. Kearney Clerk

As Amended on Denial of Rehearing, September 23, 1959.

Mr. Justice Angstman delivered the Opinion of the Court.

Defendant appeals from a judgment rendered on a verdict in the sum of $27,500 for personal injuries sustained by plaintiff while employed as a fireman, but working as an engineer, on a switch engine. The action is one under the Federal Employers' Liability Act. 45 U.S.C.A. § § 51-59.

Plaintiff's amended complaint alleges the accident occurred while the railroad crew was making up a train in the defendant's yards at Hillyard, Washington. It was alleged that the accident occurred at night, and while plaintiff was pushing cars westward with the engine; that the operation was controlled by lan-

terns in the hands of switchmen who gave signals designed to control the movement of the engine; that during the course of these operations there was a violent and sudden collision between the train which plaintiff was operating and cars that were stationary on the track; that the impact caused the injuries to plaintiff complained of; that the negligence was attributed to switchmen who failed to give the signal that there were cars on the track and who were alleged to have been negligent in other particulars; that there were three cabooses between the engine driven by plaintiff and the cars which he was pushing on the track, and these obstructed his view so that he had to rely solely on the signals given by the switchmen.

Defendant's first contention is that the court erred in denying its motion to dismiss the complaint upon the ground that the action was not brought in the proper or convenient forum in that all the witnesses reside in the State of Washington where the accident occurred. Defendant relies on the doctrine of *forum non conveniens*. The motion was made before trial, renewed at the beginning of trial, and again at the close of the case. The several motions were denied.

In its order denying the motion, the court expressed doubt as to whether the doctrine of *forum non conveniens* has any application in Montana, but stated in substance that even though it is proper to apply the doctrine in this state, the facts in the instant case do not warrant its application here.

Defendant asks us to settle the question as to whether the doctrine has application in this state. We see

no purpose in resolving this academic question here. If it does apply, the court cannot be placed in error for not granting the several motions. Admittedly, whether the doctrine should be applied in a given case is a question resting in the discretion of the trial court. Cullinan v. New York Cent. Ry. Co. (D.C.N.Y. 1948), 83 F. Supp. 870; Mooney v. Denver & R.G.W.R. Co., 118 Utah 307, 221 P. 2d 628.

Affidavits of defendant show plaintiff to be a resident of Spokane, Washington, which is near the place of the accident at Hillyard, Washington; that it would be inconvenient and expensive for defendant to try the case in Butte, Montana; that the jury would be precluded from viewing the scene of the accident; that witnesses could not be compelled to attend the trial in Montana by process of court; and that both the state and federal courts at Spokane, Washington, were available with no undue delay.

Plaintiff's counter-affidavits were to the effect that all witnesses were employees of defendant and could be brought to Montana for the trial; that because the doctors treating plaintiff at Spokane would not inform plaintiff of his injuries it was necessary for plaintiff to engage a doctor at Butte and have x-rays taken; that such medical witnesses were necessary as key witnesses and could not be compelled to attend a trial in Spokane; that a jury view of the scene of the accident would not be proper since it happened at nightime; and that plaintiff has photographs showing the yards of defendant where the accident occurred.

There is no basis for the contention that the trial

court abused its discretion in denying the motion.

Defendant contends that the court erred in admitting testimony relative to mortality and annuity tables and in giving its Instruction numbered 28 having to do with the effect of these tables. It is conceded that Instruction 28 was proper if the mortality and annuity tables were properly in evidence, hence, the only point involved on this subject is this: Was the evidence such that the case called for use of mortality and annuity tables? The test to be applied as to whether the case is one justifying the use of evidence of mortality and annuity tables is this: Is there substantial evidence in the record which would support a finding by the jury that there is permanent disability? Cornell v. Great Northern Ry., 57 Mont. 177, 187 P. 902; Ralph v. MacMarr Stores, 103 Mont. 421, 62 P. 2d 1285, and compare Gilman v. The G. W. Dart Hardware Co., 42 Mont. 96, 111 P. 550; and McNair v. Berger, 92 Mont. 441, 15 P. 2d 834.

There was medical testimony as to plaintiff's physical condition and that plaintiff was partially and permanently injured. A part of the evidence bearing on that point is referred to later in this opinion. The fact that plaintiff has worked with reasonable regularity since the accident does not militate against the claim that he has been permanently, partially disabled.

Defendant contends that it was error to give Instruction 27 reading:

"You are instructed that plaintiff had a right to assume that his fellow employees would obey the rules of the company and perform their duty thereunder."

Defendant's contention is that the evidence does not show there was any such rule. The record shows the following:

The switch foreman employed by defendant, working with the crew with which plaintiff worked, testified:

"Q. And when passing through the Yard at the railway company, is it not the duty of the Conductor and all of the Brakemen to station themselves where they can observe and transmit signals? A. Yes, sir.

"Q. That's a rule of your company, is it not? A. Yes, sir. * * *

"Q. And if the rule says that they are there with the Conductor for the purpose of observing and transmitting signals, do you comply with that rule? A. Yes, sir."

Again he testified:

"Q. Now, isn't it a rule of your Company, that before moving cars or engine in the Yard or on the Yard tracks it must be known that they can be moved with safety? A. Yes.

"Q. And it is the Conductor's duty to know that they can be moved with safety? A. Yes.

"Q. So, on this night it was your duty to know that this train could be moved with safety? A. Yes.

"Q. And that was according to the rules? A. Yes.

"Q. Is that right? A. Yes. * * *

"Q. Now, I will ask you if it isn't a rule of your Company that when pushing a train of cars the disappearance from view of the trainman's light by which

signals are given must be regarded as a stop signal? A. That's correct.

"Q. Isn't that correct? A. Yes.

"Q. Do you always obey that rule? A. Yes, sir."

This evidence was sufficient for the jury to predicate a finding that the Company did have rules governing its operations and justified the giving of Instruction No. 27.

Defendant contends that the court erred in giving Instruction No. 12 over objection that it omits the question of contributory negligence, and is an incomplete statement of the law. The Instruction given was in the following language:

"This case is based on a statute of the United States generally known as the Federal Employers' Liability Act which provides that a common carrier by railroad such as the defendant here, shall be liable to damages to any employee suffering injury while he is employed by such carrier by railroad for such injury resulting in whole or in part from the negligence, if any, of the officers, agents or employees of such carrier."

There were other instructions covering contributory negligence. Thus, Instruction No. 14 offered by the defendant and given by the court reads:

"The federal law which concerns us in this trial provides that a common carrier by railroad, such as the defendant here, shall be liable in damages to any employee who suffers injury when he is engaged in the duties of his employment, which injury results in whole or in part fro mthe negligence of any of the officers or agents or of any emplyee of such carrier, ex-

cept solely from the negligence of the one so injured. If all the factors mentioned as creating such liability existed, the fact, if it is a fact, that the employee, himself, was guilty of contributory negligence shall not be a total bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The application of this rule shortly will be explained."

Other instructions also further explained the issues of negligence and contributory negligence. The court did not err in giving its Instruction No. 12.

Defendant contends that the court erred in giving its Instruction No. 29 over objection. This instruction enumerated items of damages which the jury should consider such as physical and mental pain and suffering, and then contained this clause: "* * * loss of wages and future earnings, and the impairment of earning capacity, if any, his loss of power and capacity to work, if any, and its effect upon his future and his personal inconvenience and disfigurement, if any, insofar as caused by the injuries proven."

It is the quoted clause that defendant objected to. It contends that the evidence does not show any loss of earnings or impairment of earning capacity. It contends that the evidence does not show when, if ever, plaintiff will lose any income by reason of the accident and permits the jury to speculate. There was evidence of a partial, permanent disability. Some evidence fixed the disability at twenty per cent.

Dr. Shields who took X-ray pictures of plaintiff testified therefrom as follows:

"A. There is a bone that goes right under the eye that makes what we call the orbital socket; and, on the right side, that bone is broken in two places—right here, where my finger is (indicating), you can see a notch (indicating).

"Now over here (indicating) on the other side, you can see another notch (indicating), and the piece in the middle—the central piece of this bone (indicating), below your eye, is pushed downward and inward (indicating) and into your 'antrum' (indicating), or 'sinus' as you call it, in the jaw bone. It is a cavity in the bone—(indicating)—and that piece (indicating) is pushed downward into it. * * *

"Q. Now, what effect does that have on the patient with that bone deflected in the sinus, Doctor; what probable effect would it have? A. Well, from the history I got when I took it—I don't know offhand what date it was (witness examines file of papers)—January 10th, 1956, he was examined.

"Now, of course, at that time, around this bone (indicating), was callus. It is solid now.

"But taking his history, he had bleeding from the nose; and also shortly after he was injured, the side of the face would balloon up to about the size of a hickory nut and then it would go down again—in other words, it shows definitely that the antrum was broken into, and the bleeding went through his nose and the air care out through the sinus (indicating).

"Q. And as he inhaled the air would go up through the sinus and through the break and cause the—A. (Interrupting) Into the soft parts.

"Q.—and cause the eye to balloon up? A. Yes, And then after a few days he said that the bleeding stopped, and when the bleeding stopped, it was only a short time before there was no more ballooning up of the face.

"Q. Now, what caused that? A. Well, this (indicating) was sealed off by the clotting and the beginning of the organization of the blood that was in the fracture.

"Q. In other words, Doctor, the blood would clot up in the sinuses and block up the air passage that was broken through? A. Yes."

True, the evidence does not show clearly when that disability will be reflected in the way of decreased earnings. The fact that the instruction dealt with future effects is no valid objection. Chesapeake & Ohio Ry. Co. v. Carnahan, 241 U.S. 241, 60 L.Ed. 979, 36 Sup. Ct. 594; and see Kirchgestner v. Denver & Rio Grande W. R. Co., 118 Utah 20, 218 P. 2d 685. There was some evidence on which the jury could arrive at a proper verdict in that respect. As will be noted the instruction, when itemizing the elements of damages, constantly qualified each item with the statement, "if any."

The case of Honeycutt v. Wabash R. R. Co., 313 S.W. 2d 214 (Mo. App. 1958), is relied on by defendant as sustaining the contention that it was improper to instruct the jury as to future impairment of earning capacity. In that case plaintiff relied on proof alone of a permanent injury to warrant a claim for loss of future earnings. The court said: "Plaintiff * * * con-

tends that the submission of future impairment of earning capacity was warranted for the reason that plaintiff's evidence conclusively showed that he had sustained a permanent injury and that this alone warranted the submission of the issue." The court condemned the instruction covering the item of future impairment of earning capacity, saying: "There is no evidence of disability to work in the future, or of plaintiff's expectancy of life * * * or of plaintiff's actual earnings before the injury."

Here there was medical evidence of a twenty percent loss of ability to work. Plaintiff's life expectancy was shown and his actual earnings before the jury were shown. In this case the necessary evidence was before the jury on which it could make calculations as to damages. The evidence of the percentage of disability related to the time of the examination by the doctor and not to some future time. We call attention to the fact that it is impossible to tell from the verdict whether any allowance was actually made for loss of future earnings. It was not prejudicial error to submit the instruction complained of.

Defendent next contends that the court erred in refusing to give its proposed Instruction No. 29. That offered instruction was as follows:

"You are instructed that any award made to plaintiff as damages in this case is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of any award made to plaintiff. Further, the law does not permit you to include any sum for payment of court costs or attorney's

fees, as such matters are not submitted to you for determination."

Defendant contends that unless so instructed the jury might well consider that whatever amount they thought would compensate plaintiff would have to be increased by twenty to twenty-five percent, together with attorney's fees and costs, in order to grant the net amount they desired that plaintiff should take home as compensation for his injuries.

On this subject, the court in Combs v. Chicago, St. Paul, Minneapolis & Omaha Ry., 135 F. Supp. 750 D. C. Iowa 1955), stated the only common sense view. In that case the court said: "The Courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for future impairment of earning capacity."

The tax liability of today is no criterion of what it may be tomorrow. It has a faculty of constantly increasing in the face of vocal threats of reduction made usually on the eve of an election. And see generally Southern Pacific Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951); Hall v. C. & N. W. Ry., 349 Ill. App. 175, 110 N.E. 2d 654, note in 9 A.L.R.2d 320, and Leming v Oilfields Trucking Co., 44 Cal. 2d 343, 282 P.2d 23; O'Donnell v. Great Northern Ry. Co., 109 F. Supp. 590 (D.C. Cal. 1951); Atlantic Coast Line R. Co. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874; and Wagner v. Illinois Cent. R. Co.; 7 Ill. App.2d 445, 129 N.E. 2d 771.

There is some authority supporting the view that

such an instruction is proper. See Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42.

In Highshew v. Kushto, 126 Ind. App. 584, 131 N.E. 2d 652, it was held that the failure to give such an instruction was harmless.

That the courts are divided on the question is pointed out in the note in 63 A.L.R.2d commencing on page 1393. On page 1408 of that annotation the author says: "The more general opinion appears to be that the incidence of income tax as it relates to such damages should not be mentioned at all in the instructions to the jury, nor in argument of counsel."

Many cases are cited on page 1408, both in personal injury and death actions holding that it is improper to instruct the jury that an award will not be subject to income taxes.

We think that when the jury is instructed as here, on the elements, it would consider, in arriving at its verdict, an instruction of a negative sort as to what it may not consider is properly refused. What we have said on the subject of taxes applies with equal force to the subject of costs and attorney's fees. There was no error in refusing to give this offered instruction.

The next contention is that the jury returned a quotient verdict. Affidavits of the jurors were filed in connection with the motion for new trial which defendant relies on in support of its contention. The substance of these affidavits is that each juror wrote down the amount of money that he or she thought plaintiff should recover. The sums were thereafter added together and the result divided by twelve, which result

was then decided upon as the verdict; that it was understood and agreed before the sums were submitted and the result obtained by dividing the sum by twelve that the sum thus obtained would be the verdict; that each juror was induced to assent to the verdict because of this understanding.

However, counter-affidavits of the jurors state the original affidavit was not in accord with the facts. The counter-affidavits show that no prior agreement was made to the effect that the result of the addition and division method used would become their final verdict. Under the showing by the counter-affidavits there is no valid objection to the method by which the verdict was obtained. See Gordon v. Trevarthan (1893), 13 Mont. 387, 390, 34 P. 185, 40 Am.St.Rep. 452; Sutton v. Lowry (1909), 39 Mont. 462, 473, 104 P. 545; Great Northern Ry. v. Benjamin (1915), 51 Mont. 167, 172, 149 P. 968.

A quotient verdict is not objectionable where there is no previous agreement to be bound by the result of the quotient process. 39 Am.Jur., New Trial, § 124, p. 134.

Defendant assigns error in the refusal of the court to grant its motion for a directed verdict. Defendant asserts that the evidence was insufficient to make out a case for the jury and particularly as it affected the extent of the injuries and damages. We have carefully considered all the evidence in the case, some of which is alluded to above, and find there was ample evidence of injuries to make out a case for the jury. Likewise defendant's contention that the evidence of negligence

was insufficient to make out a case for the jury cannot be sustained. At most the evidence on the point was conflicting and this makes the question one for the jury.

Plaintiff testified he saw Rowley's lantern at all times and no signal was given until almost simultaneously Rowley and Thompson, who had gotten from the head car to the ground, gave "wash-out" signals.

Defendant contends that plaintiff's testimony is directly opposed to the testimony of the three switchmen who testified to the giving of easy or slow and stop signals by Rowley in ample time to make the coupling of the cars in the usual manner.

This court has consistently adhered to the rule that questions of credibility are for the jury alone, and, where the evidence is conflicting, it is for the jury to resolve the conflicts.

From what has already been said there is no merit in defendant's further contention that the court erred in refusing to grant a new trial for insufficiency of the evidence to justify the verdict, that the verdict is against law, and that the verdict is excessive.

It is obvious that the accident did in fact occur, and the evidence shows that plaintiff had been laid off for fifteen days by reason of the accident. There was evidence of a partial, permanent disability of twenty to twenty-five percent. There was evidence of pain and suffering. Plaintiff sought $85,000 and received only $27,500. There is no basis for the contention that the

verdict is the result of passion, and prejudice.

The judgment is affirmed.

ALBERT H. ANGSTMAN
Associate Justice

We concur:

Chief Justice

HUGH ADAIR
R. V. BOTTOMLY
Associate Justices

Mr. Chief Justice Harrison and Mr. Justice Castles:
We dissent.

JAMES T. HARRISON
Chief Justice

WESLEY CASTLES
Associate Justice